

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID TODD DALTON,

Defendant-Appellant.

UNPUBLISHED
February 17, 2005

No. 251511
Wayne Circuit Court
LC No. 03-005153-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of first-degree criminal sexual conduct.¹ The trial court sentenced defendant to two concurrent terms of eight to fifteen years in prison. We affirm defendant's convictions, but remand to the trial court for the limited purpose of correcting defendant's presentence investigation report.

I

Defendant asserts that the trial court improperly allowed Michigan State Police Trooper Dean York to testify regarding prior consistent statements made by the victim. The victim was ten years old at the time of the incidents from which defendant's convictions arise. We review the trial court's determination of evidentiary issues for abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Because he raised a timely objection, defendant preserved his challenge to the admission of the victim's statements. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A preserved nonconstitutional evidentiary error does not require reversal unless it involves a substantial right, and, on review of the entire case, it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(d) provides that some statements are not hearsay and are not barred by the general rule

¹ MCL 750.520b(1)(a) (person under thirteen).

against hearsay. Among these statements are certain prior consistent statements. MRE 801(d)(1)(B). Generally, no one may bolster a witness' testimony using that witness' prior consistent statements unless the statements fall under a hearsay exception or are not admitted as substantive evidence. *People v Hallaway*, 389 Mich 265, 275-276; 205 NW2d 451 (1973); *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). To be admissible, a prior consistent statement must meet the following requirements of MRE 801(d)(1)(B):

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000), quoting *US v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

Consistent statements made after the motive to fabricate arose are nonadmissible hearsay. *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001).

Here, the trial court ruled that York's testimony regarding the victim's statements to him about the sexual assault were admissible under the prior consistent statement exclusion to the hearsay rule. MRE 801(d)(1)(B). However, defendant did not contend that the victim recently fabricated her story. Instead, the defense theory is that because the victim, who is defendant's daughter, feared that defendant was seeking custody of her, she fabricated the sexual assault from the outset. The alleged and purported motive to fabricate (the victim's fear that her father would gain custody) occurred, according to the defense theory, before the victim spoke to York. Therefore, Trooper York's testimony regarding the victim's statements to him is inadmissible under MRE 801(d)(1)(B) and accordingly, the trial court abused its discretion when it admitted the evidence. *Id.*

Because York's testimony is inadmissible hearsay, we must determine if this error requires reversal. *Luckity, supra* at 491. Here, defendant must prove that it is more probable than not that the preserved error was outcome determinative. *Id.* at 495-496. And though there is no physical evidence of the sexual assaults, there is other evidence of defendant's guilt. That is, in addition to the victim's testimony, the victim's mother testified that that the victim had "acted differently" when she came home from visiting defendant and that, as a result of what the victim told her that night, the mother called the police and took the victim to the hospital. The hospital's sexual assault nurse testified about what the victim told her about the assaults.² The victim's sister and stepmother also corroborated the victim's testimony about being left alone with defendant at defendant's house.

Significantly, to some extent, defendant also corroborated the victim's testimony through statements he made to an investigating police officer. The officer testified that defendant said

² There was no objection to this testimony.

that the victim had recently tried to “French kiss” him. He confirmed that he and the victim were in his bed together to watch a movie on the afternoon of the assault. Further, in response to the question of whether he had ever touched the victim’s vagina, defendant said that his hand may have accidentally slid down from where he had placed it on her hip and hit her “front” as they lay together that afternoon. Defendant also admitted that he did not know whether he had an erection at that time. In light of the foregoing testimony, the improper admission of York’s testimony is harmless, and clearly, defendant failed to prove that admission of the prior consistent statement is outcome determinative. See *Rodriquez, supra* at 332. Therefore, the error does not warrant reversal.

II

Defendant alleges that the prosecutor engaged in misconduct that deprived defendant of a fair trial. Specifically, defendant says that the prosecutor improperly elicited testimony in violation of MRE 404(b) and, during closing argument, improperly implied special knowledge of the facts.³

Defendant raises a mixed issue of prosecutorial misconduct and improper introduction of bad acts evidence. Use of bad acts as evidence is excluded to avoid the risk of a jury convicting a defendant because of a defendant’s past conduct rather than the crime under consideration. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). To be admissible under MRE 404(b), bad acts evidence generally must satisfy four requirements: (1) the prosecutor must offer the prior bad acts evidence for something other than to show defendant’s bad character or propensity to engage in criminal behavior; (2) the evidence must be relevant, MRE 402; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice, MRE 403; and (4) the trial court, upon request, may provide a limiting instruction, MRE 105.⁴

Defendant challenges statements that the victim’s mother made during direct examination about the relationship between defendant and his children. The victim’s mother’s testimony was not elicited by the prosecution, but was nonresponsive to his questions. A layperson’s nonresponsive, volunteered answer to a proper question is ordinarily not grounds requiring reversal. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). As part of the background information, the prosecutor tried to establish the pattern of the victim’s visitation with defendant. “[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*,

³ Defendant objected to the statement the prosecutor made during closing, but did not object to the introduction of the alleged MRE 404(b) evidence. We review de novo preserved issues of prosecutorial misconduct in context to determine if the defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Unpreserved issues are reviewed for plain error affecting defendant’s substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

⁴ *Id.*, citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The prosecutor must provide reasonable notice of the intent to present bad acts evidence so that the defendant can object to its admission and defend against it. MRE 404(b)(2). *People v Hawkins*, 245 Mich App 439, 454; 628 NW2d 105 (2001).

453 Mich 730, 741; 556 NW2d 851 (1996). Absent information about the visitations, the jury might not have been able to understand fully the events in this case.

Defendant also asserts that the prosecutor improperly elicited the victim's testimony, in violation of MRE 404(b), that she avoided visiting defendant because he was abusive to her and to her sister. While the prosecutor did elicit this information, relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal character of an individual to establish that he acted in conformity with that character. *VanderVliet, supra* at 74-75. Here, defendant's primary theory of defense is that the victim made up the sexual assault charges because she was afraid that she would be taken from her mother. The evidence of defendant's past relationship with the victim helped explain why she did not want to see defendant, not to show that he acted in conformity with his abusive behavior.

Defendant also contends that the prosecutor improperly implied during closing argument that the prosecution possessed special knowledge of the facts. The prosecutor stated at the beginning of closing:

I'd like to sit down with all twelve of you. We'll pick one person out. We don't know who. I'd like to sit down with you and talk about this case and answer any questions that you might have and answer any comments you might have and help you in any way I can. The only problem with that is they don't let me do that right now. . . .

Though this approach to closing argument comes dangerously close to implying some special knowledge, read in context, the prosecutor's remarks do not constitute reversible error.

III

Defendant also claims, erroneously, that he received ineffective assistance of counsel. Because defendant failed to preserve this issue for review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors reflected in the trial record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was below an objective standard of reasonableness and a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

Defendant argues that his trial counsel was ineffective because he did not move in limine or object at trial to prevent the admission of evidence of his poor relationship with his children. However, we have already held that the admission of this error was not erroneous. Accordingly, based on the record, we hold that defendant failed to demonstrate ineffective assistance of counsel.

IV

Defendant maintains that this case should be remanded to the trial court to correct two errors in the presentence investigation report (PSIR). We review the trial court's response to a

claim of inaccuracies in the defendant's PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

Defendant challenged the accuracy of the PSIR at sentencing, and thus, preserved the issue on appeal. MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). The sentencing court must respond to challenges of information in the PSIR and has three options in responding: (1) hold an evidentiary hearing to determine the accuracy of the information, (2) accept the defendant's version, or (3) disregard the challenged information. *Spanke, supra* at 649. The court must make a finding on the record on the merits of defendant's challenge. *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990). If the court finds that the challenged information is inaccurate or irrelevant, that finding must be made part of the record, and the information must be corrected or stricken from the PSIR before sending it to the MDOC. MCL 771.14(6); MCR 6.425(D)(3); *Spanke, supra* at 649; *Hoyt, supra* at 462.

At sentencing, defendant challenged references to trust fund monies and lack of child support payment in the PSIR. In response to defendant's challenge regarding the trust fund, the court said that because there was no issue of restitution, questions of defendant's financial assets were not "terribly important here." Because the court indicated that the information was irrelevant, the information must be stricken or corrected to reflect that the money has been completely spent. *Spanke, supra* at 650. No further finding was placed on the record about the relevancy or accuracy of the trust fund information nor was there an order to strike that information from the PSIR. Also at sentencing, in response to defendant's challenge of the child support information, the victim's mother stated that defendant was paying child support. The court stated, "I will strike it, of course, based on the mother's own statement" However, the PSIR continues to contain the inaccurate information. Therefore, this case is remanded for the limited purpose of striking the irrelevant or inaccurate references to the trust fund and absence of child support payments. MCL 771.14(6); MCR 6.425(D)(3); *Spanke, supra* at 650.

Affirmed, but remanded for correction of the presentence investigation report. We do not retain jurisdiction

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski